

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ISAIAH H.,

Claimant,

vs.

VALLEY MOUNTAIN REGIONAL
CENTER,

Service Agency.

OAH No. 2013040798

DECISION

This matter was heard before Administrative Law Judge Susan H. Hollingshead, State of California, Office of Administrative Hearings (OAH), in Stockton, California, on August 16, 2013.

Anthony Hill, Assistant Director of Case Management, represented the Service Agency, Valley Mountain Regional Center (VMRC).

Claimant was represented by his mother. His adult sister was also present throughout the hearing.

Oral and documentary evidence was received. At the conclusion of the hearing, the record was closed and the matter was submitted for decision.

ISSUE

Is claimant eligible for regional center services based on a qualifying condition of mental retardation pursuant to Welfare and Institutions Code section 4512, subdivision (a), and California Code of Regulations, title 17, section 54000?¹

¹ Unless otherwise indicated, all statutory references are to the California Welfare and Institutions Code.

FACTUAL FINDINGS

1. Claimant is a thirteen-year-old boy who lives in the family home with his adoptive mother and three siblings. He was reportedly born four months premature, after drug and alcohol exposure, and weighed one pound, six ounces at birth. Claimant was released from the hospital to his adoptive mother (mother) at ten months of age, weighing six pounds, eight ounces.

He has a complicated medical history. Claimant has had significant feeding difficulties throughout his life and has had a gastrostomy tube since he was three months old, which allows him to feed both by mouth and through his feeding tube. He has had asthma since birth. He wears pull-ups and takes medications to soften his stools due to chronic constipation and lack of muscle control. He is prescribed psychotropic medication, originally Risperdal and currently Abilify, for mood stabilization.

Claimant's mother seeks services from VMRC due to concerns with academic difficulties, behavior and anger issues.

2. The parties agreed that the issue for this hearing is whether claimant qualifies for VMRC services and supports as an individual with mental retardation.²

3. Claimant qualified for California Early Start services through VMRC, pursuant to the California Early Intervention Services Act³ which provides early intervention services for infants and toddlers from birth to two years of age, inclusive, who have disabilities or are at risk of disabilities, to enhance their development and to minimize the potential for developmental delays.

As claimant approached his third birthday and would no longer qualify for early intervention services, VMRC determined that it would continue to provide services and reevaluate claimant in a year. Claimant was subsequently evaluated for services pursuant to the Lanterman Developmental Disabilities Services Act. It was determined that claimant did not have mental retardation or any other developmental disability which qualified him for Lanterman Act services.

4. Pursuant to the Lanterman Act, Welfare and Institutions Code section 4500, et seq., regional centers accept responsibility for persons with developmental disabilities. Welfare and Institutions Code section 4512 defines developmental disability as follows:

² The terms "Mental Retardation" and "Intellectual Disability" are used interchangeably. VMRC has adopted the term intellectual disability while the Lanterman Act uses mental retardation.

³ California Government Code Section 95000 et seq.

“Developmental disability” means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . [T]his term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation [commonly known as the “fifth category”], but shall not include other handicapping conditions that are solely physical in nature.

5. California Code of Regulations, title 17, section 54000, further defines the term “developmental disability” as follows:

(a) “Developmental Disability” means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Development Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation,

educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

6. Welfare and Institutions Code section 4512, subdivision (1), defines substantial disability as:

(1) The existence of significant functional limitation in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

- (1) Self-care.
- (2) Receptive and expressive language.
- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

7. California Code of Regulations, title 17, section 54001, provides:

(a) "Substantial disability" means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of functional limitation, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

- (1) Receptive and expressive language.
- (2) Learning.
- (3) Self-care.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

8. As claimant approached his third birthday, he was also being evaluated by Stockton Unified School District to determine eligibility for special education services. An Individualized Education Program (IEP) team met on September 18, 2003, and determined that claimant was eligible for special education services based on a speech and language disability.

Claimant was assessed using the Bailey Scales of Infant Development (BSID-II) and Developmental Profile II (DPII). There was no evidence of mental retardation at that time. The IEP team determined that claimant required “a protective environment in order to accommodate health care need. [Claimant] will receive individual and small group instruction in the SDC [special day class] setting, accessing teacher made material relative to his identified needs. Health care procedures as prescribed by physician.” Goals were written to address concerns with his receptive and expressive language.

9. In November 2012, claimant’s mother referred him to VMRC to assess for mental retardation. She testified that she is concerned with his development, specifically his “hard time with learning, anger issues” and behaviors. She described claimant as being small in stature and a “very sweet boy” who acts “very, very young.” He has a “very young mindset.” She stated that he still likes to hold her hand and she is not comfortable leaving him alone. For example, he might not use good safety judgment while crossing the street. She described his “anger issues” to be “like a five year old throwing a tantrum.”

Claimant’s mother presented as a very caring parent who is concerned about her son and attempting to obtain appropriate services to assist him.

10. Barbara Johnson Psy.D., is a VMRC Clinical Psychologist with extensive experience assessing and diagnosing individuals with developmental disabilities. One of her responsibilities is participating in the eligibility review process. Dr. Johnson testified that VMRC referred claimant to Licensed Educational Psychologist Jose M. Avila, Ed.D., for a psychological evaluation to assist in determining his eligibility for services. The VMRC Eligibility Team considered the results of this evaluation, reviewed claimant’s records and met with claimant and his mother. Based on the available information, the Eligibility Team determined that claimant did not have a qualifying developmental disability. The Intake

Assessment, completed by VMRC Intake Coordinator Valentine Chukwueloka, recommended as follows:

1. Explore special education to help him improve on his academics.
2. Explore behavior services to reduce his negative behaviors.

11. As a result of the eligibility team determination, A Notice of Proposed Action (NOPA) was issued on April 4, 2013, informing claimant that VMRC determined he is not eligible for regional center services. The NOPA stated:

An interdisciplinary team composed of VMRC's clinical psychologist, physician, and service coordinator reviewed medical, psychological, and educational records and found your child ineligible for VMRC services.

The applicant does not have a substantially handicapping developmental disability.

12. On April 11, 2013, claimant's mother filed a Fair Hearing Request, disputing his ineligibility, stating that "the school testing and psychological testing is the same, they are different than the VMRC testing."

13. Dr. Avila utilized the Differential Abilities Scales, Second Edition, School Age Version (DAS-II), the Developmental Test of Visual-Motor Integration (DTVMI-6), and the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II). He also considered observations of behavior, review of records and parent interview.

14. Dr. Avila's report, dated February 2, 2013, provided the following test results:

On the DAS-II School Age Version, "a test of cognitive abilities, [claimant] obtained a GCA score of 86 placing his overall abilities in the low average range. With 90% confidence, [claimant's] ability will most likely fall between 82-91 in future evaluations. He obtained the following scores compared to children the same age:

Composite	Standard Score
Verbal	93 - Average
Nonverbal Reasoning	76 – Borderline
Spatial	94 – Average
GCA	86 – Low Average

The DTVMI-6 "is a developmental sequence of geometric forms that the student copies with paper and pencil. It is designed to assess the extent to which individuals can integrate their visual and motor abilities (eye-hand coordination). [Claimant] obtained a standard score of 72

which places his visual motor integration skills in the borderline range compared to students the same age.”

The Vineland II “measures the personal and social skills of individuals from birth to adulthood. Because adaptive behavior refers to an individual’s performance of the day-to-day activities required for personal and social sufficiency, these scales assess what a person actually does, rather than what he/she is able to do. The Vineland II assesses adaptive behavior in four domains: Communication, Daily Living Skills, Socialization and Motor Skills. The Adaptive Behavior Composite Score summarizes [claimant’s] performance across all domains. The Vineland II was completed through interview with [claimant’s mother]”

Domain	Standard Score
Communication	82 – Low Average
Daily Living Skills	81 – Low Average
Socialization	71 – Borderline
Adaptive Behavior Composite	76 – Low Average

15. Dr. Avila concluded as follows:

The results of this assessment place [claimant] in the low average range of cognitive ability compared to students the same age. His fine motor skills are in the borderline range. With regard to adaptive behavior, his overall skills are also in the low average range. The results of this evaluation indicate that [claimant] does not present as a student with global developmental delays.

16. Dr. Johnson testified that the VMRC Multidisciplinary Team also considered claimants school records as part of the eligibility review. She explained that though his initial eligible for special education was based on a speech and language disability, he currently receives services based on a primary disability of “Other Health Impaired” with a secondary disability of “Specific Learning Disability (SLD).”⁴

Claimant’s current Stockton Unified School District (SUSD) IEP dated October 3, 2012, documents these disabilities as well as claimant’s long complicated medical history. It also contains a Behavior Support Plan (BSP) to address his behavioral concerns. The BSP notes that Claimant “has not yet learned how to express his frustration” and “will shut down and/or throw chairs, desks, and kick furniture.”

⁴ A student qualifies for special education services under the category of SLD if the student has a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest in an impaired ability to listen, think, speak, read, write, spell, or do mathematical calculations, and has a severe discrepancy between intellectual ability and academic achievement.

Claimant does not qualify for services as a student with mental retardation. Claimant has never qualified for educational services and supports as a student with mental retardation.

17. SUSD referred claimant to School Psychologist Kimberley Robinson, M.S., for a psychological evaluation as part of his triennial assessment to determine ongoing eligibility for special education services. Ms. Robinson assessed claimant during September and October 2012. Her report included the following:

Cognitive Functioning:

[Claimant's] cognitive functioning was estimated using the Naglieri Nonverbal Ability Test and the Wide Range Assessment of Memory & Learning – Second Edition.⁵ These assessment tools measure visual reasoning and overall memory skills. Each provides information in regards to cognitive strengths and weaknesses for [claimant]. Scaled scores ranging between 8 and 12 are considered to fall within the Average range. [Claimant] was given the general memory index on the WRAML-2, which included the following three indexes: Verbal Memory, Visual Memory, and Attention/Concentration.

<u>Indexes</u>	<u>Standard Scores</u>
Verbal Memory	80
Visual Memory	109
Attention/Concentration	76
General Memory	84
Screening Memory	92

Overall, [claimant] obtained a Low Average range score on his general memory index. Areas of strength are seen in his visual memory abilities. Areas of weakness are seen in attention/concentration skills. These scores are consistent to testing in the past and continue to indicate functioning within the Low Average range. [Claimant] presented as a capable student who is functioning well in regards to cognitive skills

On the NNAT, [claimant] obtained a standard score of 57, which placed his overall visual reasoning skills within the Very Low range. This score is lower than testing in the past and suggests

⁵ The report notes, “due to a past court ruling in the State of California that found intelligence tests to be discriminatory with African-American students, alternative measures were used to estimate [claimant's] cognitive functioning.” Ms. Robinson is referring to *Larry P. v. Riles* (9th Cir. 1986) 793 F.2d 969, which forbids the use of standardized IQ tests to determine the cognitive abilities of African-American children for special education eligibility.

weaknesses in visual reasoning skills. It should be noted that this was the first test that [claimant] did with the examiner and it is possible that rapport was not established.

18. Ms. Robinson also assessed auditory, adaptive, visual-motor and visual perceptual and academic functioning. She concluded as follows:

Summary:

[Claimant's] overall estimated intellectual abilities fell within the Low Average range of development. These scores are consistent to testing in the past. Areas of strength are seen in [claimant's] visual memory, visual perceptual, coping and daily living skills. Areas of deficit are noted in his attention, reasoning and motor coordination skills. Medically, [claimant] suffers from gastro-esophageal reflux disease and continues to require a g-tube for feeding. Academically, [claimant] demonstrated strengths in his oral language and written expression skills. Deficits continue to be in his reading comprehension and overall mathematics. [Claimant] is making slow academic progress in the school setting. Overall, [claimant] appears to be in need of ongoing special education services in order to make progress with the general education curriculum.

[Claimant] appears to continue to meet Other Health Impairment eligibility . . .

However, [claimant] does appear to meet the eligibility criteria for special education services under specific learning disabled as well. A student must have evidence of a disorder in one or more of the basic psychological processes and a severe discrepancy between their potential and performance scores. [Claimant] does indicate disabilities in the areas of auditory reasoning and sensory motor skills, and indicates a severe discrepancy when comparing his intellectual abilities to his standardized academic skills.

19. Of concern to claimant's mother, was a Report of Psychological Testing performed by Dr. Scott Howard Ed. D., at San Joaquin County Mental Health. Dr. Howard's Report dated November 28, 2012, reported the following scores from administration of the Wechsler Abbreviated Scale of Intelligence (WASI):

Performance	68
Verbal	55
Full Scale	59

Dr. Howard made the following recommendations:

1. An evaluation by Valley Mountain Regional Center is recommended.
2. The therapeutic modality that would work best with him would be behavior modification.
3. Given his physical growth concerns and GI-tube his psychiatrist and PCP should work closely together.

20. Dr. Johnson testified that the WASI is not a comprehensive cognitive assessment but an abbreviated instrument more appropriately used as a screening tool. She explained that Dr. Howard's results were inconsistent with other available information so VMRC chose to refer claimant to Dr. Avila for a comprehensive assessment. She also noted that claimant "did not perform well and may have had a bad day." Individuals can score lower than their ability but cannot score higher.

Dr. Johnson explained that the VMRC Eligibility Team placed more weight on Dr. Avila's report as a comprehensive assessment that was consistent with other available information. A comprehensive review of all available information was used to determine whether claimant meets the diagnostic criteria for Mental Retardation, according to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) which was the operative edition throughout claimant's eligibility review process.⁶

21. The diagnostic criteria for "Mental Retardation" as set forth in section 4512 is defined in the DSM-IV-TR to require:

- A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test...

⁶ The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) was then current standard for diagnosis and classification. It is a multi-axial system which involves five axes, each of which refers to a different domain of information as follows:

Axis I	Clinical Disorders
	Other Conditions That May Be a Focus of Clinical Attention
Axis II	Personality Disorders
	Mental Retardation
Axis III	General Medical Conditions
Axis IV	Psychosocial and Environmental Problems
Axis V	Global Assessment of Functioning

B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her culture group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

C. The onset is before 18 years.⁷

22. VMRC Clinical Psychologist Dr. Johnson testified that VMRC Eligibility Team concluded that while claimant is impacted by severe learning disabilities, emotional concerns and a complicated medical history, there was nothing in the records to substantiate that claimant presents with a substantially limiting developmental disability. Claimant's general intellectual functioning has not been found to be significantly subaverage, as defined by the DSM-IV-TR, at this time.

23. The evidence presented did not demonstrate that claimant is eligible for VMRC services based upon a diagnosis of mental retardation. However, if new or additional information becomes available, claimant may seek reconsideration at anytime prior to attaining age eighteen.

LEGAL CONCLUSIONS

1. Eligibility for regional center services is limited to those persons meeting the eligibility criteria for one of the five categories of developmental disabilities set forth in section 4512 as follows:

"Developmental disability" means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual....[T]his term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation [commonly known as the "fifth category"], but shall not include other handicapping conditions that consist solely physical in nature.

⁷ The Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition (DSM-V) was released in May 2013. Most notably, it changed the diagnosis Mental Retardation to Intellectual Disability (Intellectual Development Disorder) and no longer uses a multi-axial system. The new classification system combines the axes together and disorders are rated by severity.

Handicapping conditions that consist solely of psychiatric disorders, learning disabilities or physical conditions do not qualify as developmental disabilities under the Lanterman Act.

2. It was not disputed that claimant has a complicated medical history and is impacted by severe learning disabilities and emotional issues. However, provision of regional center services is limited to those individuals meeting the stated eligibility criteria. The evidence presented did not prove that claimant's current impairments resulted from a qualifying condition which originated and constituted a substantial disability before the age of eighteen. There was no evidence to support a finding of mental retardation and it was not established that claimant has a developmental disability as defined by the Lanterman Act.

3. Claimant bears the burden of establishing that he meets the requirements to receive services pursuant to the Lanterman Act.⁸ He has not met that burden. While claimant does not meet the eligibility criteria for regional center services at this time, if new information becomes available claimant may seek reconsideration prior to attaining age eighteen.

4. Claimant does not meet the eligibility requirements for services under the Lanterman Act at this time and is therefore not currently eligible for services through VMRC.

ORDER

Claimant's appeal from the Valley Mountain Regional Center's denial of eligibility for services is denied.

DATED: August 28, 2013

SUSAN H. HOLLINGSHEAD
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)

⁸ California Evidence Code section 500 states that "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."